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10 UNITED STATES DISTRICT COURT

11 EASTERN DISTRICT OF CALIFORNIA

12 JOHN RICHARD GIBSON, ) CV F 05 0042 AWI LJO HC  
13 Petitioner, ) FINDINGS AND RECOMMENDATION  
14 v. ) REGARDING PETITION FOR WRIT OF  
15 LEA ANN CHRONES, Warden, ) HABEAS CORPUS  
16 Respondent. ) [Doc. #1]

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18 Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus  
19 pursuant to 28 U.S.C. § 2254. This action has been referred to this Court pursuant to 28 U.S.C.  
20 § 636(b)(1) and Local Rule 72-302.

21 **BACKGROUND<sup>1</sup>**

22 Petitioner is currently in the custody of the California Department of Corrections pursuant to  
23 a judgment of the Superior Court of California, County of Los Angeles, following his conviction by  
24 jury trial on March 12, 1979, of murder in the first degree in violation of Cal. Penal Code § 187. On  
25 April 19, 1979, Petitioner was sentenced to serve an indeterminate prison term of seven years to life.

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28 <sup>1</sup>This information is derived from the petition for writ of habeas corpus, Respondent's answer to the petition, and  
and Petitioner's traverse to Respondent's answer.

1 On January 3, 2002, a parole suitability hearing was held by the California Board of Prison  
2 Terms (“BPT”). At the conclusion of the hearing, the BPT denied parole and deferred rehearing for  
3 three years.

4 On February 1, 2002, Petitioner filed an administrative appeal of the decision. On November  
5 13, 2002, the appeal was denied. Thereafter, Petitioner did not pursue any further administrative  
6 appeals or appellate challenges in the state courts.

7 On November 20, 2003, Petitioner filed a civil rights complaint in this Court. See Case No.  
8 CV F 03 6639 AWI DLB HC. On December 17, 2003, it was redesignated as a federal petition for  
9 writ of habeas corpus. On May 14, 2004, the petition was dismissed for failure to exhaust state  
10 remedies.

11 On February 19, 2004, Petitioner filed a petition for writ of habeas corpus in the California  
12 Supreme Court. On December 22, 2004, the petition was summarily denied.

13 On January 10, 2005, Petitioner filed the instant petition for writ of habeas corpus in this  
14 Court. The petition for writ of habeas corpus does not challenge the underlying conviction; rather, it  
15 challenges the January 3, 2002, decision of the California Board of Prison Terms to deny parole.

16 On June 27, 2005, Respondent filed an answer to the petition for writ of habeas corpus.

17 On July 13, 2005, Petitioner filed a traverse to Respondent's answer. On July 15, 2005,  
18 Petitioner filed an opposition to Respondent's contention that the petition was filed beyond the one-  
19 year statute of limitations.

## DISCUSSION

## 21 | I. Standard of Review

22 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of  
23 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its enactment.  
24 Lindh v. Murphy, 521 U.S. 320 (1997), *cert. denied*, 522 U.S. 1008 (1997); Jeffries v. Wood, 114  
25 F.3d 1484, 1499 (9<sup>th</sup> Cir. 1997), *quoting Drinkard v. Johnson*, 97 F.3d 751, 769 (5<sup>th</sup> Cir. 1996), *cert.*  
26 *denied*, 520 U.S. 1107 (1997), *overruled on other grounds by* Lindh v. Murphy, 521 U.S. 320 (1997)  
27 (holding AEDPA only applicable to cases filed after statute’s enactment). The instant petition was  
28 filed after the enactment of the AEDPA; thus, it is governed by its provisions.

1 Petitioner is in custody of the California Department of Corrections pursuant to a state court  
2 judgment. Even though Petitioner is not challenging the underlying state court conviction, 28 U.S.C.  
3 § 2254 remains the exclusive vehicle for his habeas petition because he meets the threshold  
4 requirement of being in custody pursuant to a state court judgment. White v. Lambert, 370 F.3d  
5 1002, 1006 (9<sup>th</sup> Cir.2004); Sass v. California Board of Prison Terms, 2005 WL 1406100, \*2 (E.D.  
6 Cal.2005); see 28 U.S.C. § 2254(a) (This Court may entertain a petition for writ of habeas corpus "in  
7 behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is  
8 in custody in violation of the Constitution or laws or treaties of the United States.").

9 The instant petition is reviewed under the provisions of the Antiterrorism and Effective Death  
10 Penalty Act which became effective on April 24, 1996. Lockyer v. Andrade, 538 U.S. 63, 70  
11 (2003). Under the AEDPA, an application for habeas corpus will not be granted unless the  
12 adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable  
13 application of, clearly established Federal law, as determined by the Supreme Court of the United  
14 States" or "resulted in a decision that was based on an unreasonable determination of the facts in  
15 light of the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d); see Lockyer,  
16 538 U.S. at 70-71; see Williams, 529 U.S. at 413.

17 As a threshold matter, this Court must "first decide what constitutes 'clearly established  
18 Federal law, as determined by the Supreme Court of the United States.'" Lockyer, 538 U.S. at 71,  
19 quoting 28 U.S.C. § 2254(d)(1). In ascertaining what is "clearly established Federal law," this Court  
20 must look to the "holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time  
21 of the relevant state-court decision." Id., quoting Williams, 592 U.S. at 412. "In other words, 'clearly  
22 established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by  
23 the Supreme Court at the time the state court renders its decision." Id.

24 Finally, this Court must consider whether the state court's decision was "contrary to, or  
25 involved an unreasonable application of, clearly established Federal law." Lockyer, 538 U.S. at 72,  
26 quoting 28 U.S.C. § 2254(d)(1). "Under the 'contrary to' clause, a federal habeas court may grant the  
27 writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a  
28 question of law or if the state court decides a case differently than [the] Court has on a set of

1 materially indistinguishable facts.” Williams, 529 U.S. at 413; see also Lockyer, 538 U.S. at 72.  
2 “Under the ‘reasonable application clause,’ a federal habeas court may grant the writ if the state court  
3 identifies the correct governing legal principle from [the] Court’s decisions but unreasonably applies  
4 that principle to the facts of the prisoner’s case.” Williams, 529 U.S. at 413.

5 “[A] federal court may not issue the writ simply because the court concludes in its  
6 independent judgment that the relevant state court decision applied clearly established federal law  
7 erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 411. A  
8 federal habeas court making the “unreasonable application” inquiry should ask whether the state  
9 court’s application of clearly established federal law was “objectively unreasonable.” Id. at 409.

10 Petitioner has the burden of establishing that the decision of the state court is contrary to or  
11 involved an unreasonable application of United States Supreme Court precedent. Baylor v. Estelle,  
12 94 F.3d 1321, 1325 (9th Cir. 1996). Although only Supreme Court law is binding on the states,  
13 Ninth Circuit precedent remains relevant persuasive authority in determining whether a state court  
14 decision is objectively unreasonable. See Clark v. Murphy, 331 F.3d 1062, 1069 (9<sup>th</sup> Cir.2003);  
15 Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir.1999).

16 AEDPA requires that we give considerable deference to state court decisions. The state  
17 court’s factual findings are presumed correct. 28 U.S.C. § 2254(e)(1). We are bound by a state’s  
18 interpretation of its own laws. Souch v. Schaivo, 289 F.3d 616, 621 (9th Cir.2002), *cert. denied*, 537  
19 U.S. 859 (2002), *rehearing denied*, 537 U.S. 1149 (2003).

20 II. Untimeliness of Petition

21 Respondent claims the instant petition is barred by the one-year statute of limitations set forth  
22 in 28 U.S.C. § 2244(d)(1).

23 As previously indicated, the instant petition was filed on January 10, 2005, and thus, it is  
24 subject to the provisions of the AEDPA. The AEDPA imposes a one year period of limitation on  
25 petitioners seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As  
26 amended, § 2244, subdivision (d) reads:

27 (1) A 1-year period of limitation shall apply to an application for a writ of habeas  
28 corpus by a person in custody pursuant to the judgment of a State court. The  
limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

10 || 28 U.S.C. § 2244(d).

11 In most cases, the limitation period begins running on the date that the petitioner's direct  
12 review became final. In a situation such as this where the petitioner is challenging the BPT's  
13 decision to deny parole, the relevant date for determining when the one-year statute of limitations  
14 began to run is when the BPT denied petitioner's administrative appeal. Redd v. McGrath, 343 F.3d  
15 1077 (9<sup>th</sup> Cir. 2003). Here, the BPT denied Petitioner's administrative appeal on November 13, 2002.  
16 Therefore, Petitioner had one year until November 13, 2003, to file the instant petition. However,  
17 Petitioner did not file the instant federal petition until January 10, 2005. Absent applicable tolling,  
18 the petition is time-barred.

A. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)

20 Title 28 U.S.C. § 2244(d)(2) states that the “time during which a properly filed application  
21 for State post-conviction or other collateral review with respect to the pertinent judgment or claim is  
22 pending shall not be counted toward” the one year limitation period. 28 U.S.C. § 2244(d)(2). In  
23 Carey v. Saffold, the Supreme Court held the statute of limitations is tolled where a petitioner is  
24 properly pursuing post-conviction relief, and the period is tolled during the intervals between one  
25 state court's disposition of a habeas petition and the filing of a habeas petition at the next level of the  
26 state court system. 122 S.Ct. 2134, 2135-36 (2002); see also Nino v. Galaza, 183 F.3d 1003, 1006  
27 (9<sup>th</sup> Cir. 1999), *cert. denied*, 120 S.Ct. 1846 (2000).

28 Here, Petitioner did not file any applications for state collateral relief until filing his habeas

1 petition in the California Supreme Court on February 19, 2004. However, the limitations period had  
2 already expired at this point. Petitioner argues that he filed a federal habeas petition in this Court on  
3 December 17, 2003, in Case No. CV F 03 6639 AWI DLB P. Actually, the petition was filed on  
4 November 20, 2003, as a civil rights complaint. It was redesignated on December 17, 2003, as a  
5 habeas corpus action. Ultimately, the petition was dismissed without prejudice on May 14, 2004,  
6 because Petitioner's sole claim for relief was unexhausted. In any case, the petition/complaint was  
7 filed after the limitations period had already expired; therefore, it could not operate to toll the  
8 limitations period. Moreover, the limitations period is not tolled for the time such an application is  
9 pending in federal court. Duncan v. Walker, 121 S.Ct. 2120, 2129 (2001).

10                   **B. Other Considerations**

11                   Petitioner contends he filed a state habeas petition in the Los Angeles County Superior Court  
12 in Case No. A613586, which he states was denied on November 30, 2003. However, the matter he  
13 references is actually his underlying criminal action; it is not a habeas action challenging the parole  
14 board's decision.

15                   Petitioner also objects to Respondent's averment of a violation of the limitations period in the  
16 answer. Petitioner cites to the briefing schedule which required Respondent to file a motion to  
17 dismiss based on limitations within sixty (60) days of the date of service of the order. Petitioner  
18 correctly points out that Respondent's answer was filed after this time period had elapsed.  
19 Nevertheless, the briefing schedule only applied to the filing of a motion to dismiss in lieu of an  
20 answer. The Court's order did not preclude Respondent from raising the issue in her answer. It was  
21 within Respondent's discretion to address the issue of the limitations period in a motion to dismiss,  
22 or as part of her answer addressing the merits of the petition.

23                   Petitioner has violated the one-year statute of limitations. Therefore, the petition should be  
24 dismissed with prejudice.

25                   **RECOMMENDATION**

26                   Accordingly, the Court hereby RECOMMENDS that the petition for writ of habeas corpus be  
27 DISMISSED with prejudice and the Clerk of Court be DIRECTED to enter judgment for  
28 Respondent.

1        This Findings and Recommendation is submitted to the Honorable Anthony W. Ishii, United  
2 States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule  
3 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of  
4 California.

5        Within thirty (30) days after being served with a copy, any party may file written objections  
6 with the court and serve a copy on all parties. Such a document should be captioned "Objections to  
7 Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and  
8 filed within ten (10) court days (plus three days if served by mail) after service of the objections.  
9 The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The  
10 parties are advised that failure to file objections within the specified time may waive the right to  
11 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9<sup>th</sup> Cir. 1991).

12 IT IS SO ORDERED.

13 **Dated:** August 22, 2006  
14 b9ed48

/s/ Lawrence J. O'Neill  
15 UNITED STATES MAGISTRATE JUDGE

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